No. 15359

United States
Court of Appeals
For the Ninth Circuit

JOAN HESS,
Appellant,

vs.

E. B. BENNETT and JACK E. BENNETT, doing business as E. B. BENNETT & SON, and MARION M. HUGHES,
Appellees.

Appellees' Brief

Appeal from the United States District Court for the District of Oregon

JOHN S. HORTON, Summer Building, Baker, Oregon,
Attorney for Appellant.

BANTA, SILVEN & HORTON, Summer Building, Baker, Oregon,
THOMAS Y. GWILLIAM, Nampa, Idaho,
Of Counsel.

WALTER J. COSGRAVE, 723 Pittock Block, Portland 5, Oregon,
Attorney for Appellees.

MAGUIRE, SHIELDS, MORRISON & BAILEY,
723 Pittock Block, Portland 5, Oregon.
Of Counsel.

HOUGHTON-CARSON COMPANY, PRINTERS

SUBJECT INDEX

TABLE OF AUTHORITIES

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STATEMENT OF JURISDICTION

Plaintiff brought this action against defendants, based upon diversity of citizenship, for personal injuries incurred while plaintiff was a passenger in an automobile driven by defendant Marion Hughes and owned by defendants Bennett.

INTRODUCTION

The jury returned a verdict in favor of the defendants and the appellant contends that there were

three errors committed by the Court in the trial: (1) the instructing of the jury on the defenses of contributory negligence and assumption of risk; (2) the removal by the Court of the matter of the condition of the car door as it related to the gross negligence of the appellee Hughes; (3) the refusing to give certain requested instructions concerning the car door condition as it related to the gross negligence of appellee Hughes.

STATEMENT OF THE CASE

E. B. Bennett and Jack E. Bennett were doing business in the City of Burns, Oregon, as E. B. Bennett & Son (Tr. II, 64, 68) and had as one of their employees, Marion M. Hughes (Tr. II, 34). On the day in question Hughes was authorized by his employers to take a certain 1949 Mercury, owned by Bennetts, from Burns, Oregon, and deliver the same to Portland, Oregon (Tr. II, 35). Hughes, with the permission of E. B. Bennett and Jack E. Bennett, invited his sister, Joan Hess and Jerry Hess, her husband, to accompany him on the trip to Portland (Tr. II, 36). Some weeks prior to this trip Hughes had driven the car on another trip upon which he had had trouble with the door on the driver's side, and had to tie it shut (Tr. II, 37). Thereafter, a new latch was placed in the door by defendants Bennetts' mechanic at their garage (Tr. II, 66).

On the day in question the trio, composed of Hughes driving, Joan Hess, and her husband Jerry Hess, left Burns for Portland, Oregon (Tr. II, 5, 38, 39). En route there was some difficulty with the latch on the door in getting the door closed (Tr. II, 5, 6, 39, 40, 50, 51). After driving for a period of time Hughes allowed Joan Hess's husband to drive the automobile on toward Salem (Tr. II, 7). En route to Salem the husband of Joan Hess was stopped by a State Police officer and taken to Salem (Tr. II, 7). There they were cautioned to drive more carefully (Tr. II, 7). From Salem Hughes resumed the driving of the automobile (Tr. II, 7). Although there was testimony to the contrary, the plaintiff admitted that Hughes was merely trying to keep up with traffic and that while passing another car, the other car would not let him return to his own side of the road and that he got excited (Tr. II, 29, 30), and that when he started back into his own lane the car went into a skid (Tr. II, 15, 29, 30).

ARGUMENT

It was the contention of appellees at the conclusion of the plaintiff's case that the appellant had shown no right to recover because there was no evidence of gross negligence on the part of appellees. (Defendants' Motion for Dismissal, Tr. II, 60). The Court overruled the Motion at that time with the thought of giving it further consideration, feeling

that there was slight, if any, evidence of gross negligence (Tr. II, 63).

The Motion was renewed at the close of all of the evidence (Tr. II, 72), but the Court submitted the case to the jury, which returned its verdict in favor of appellees. By its verdict the jury confirmed what appeared as a matter of law from the evidence, i.e. that there was no gross negligence.

Plaintiff, herself, testified at the trial as follows (Tr. II, 29, 30):

> "Q. I will ask you, referring to page 10, at the time this deposition was taken, if I asked this question. 'Then as you left Salem, he was proceeding along with the rest of the traffic, would that be a correct statement?' Answer, 'yes'. Were you asked that question and did you make that answer?
>
> A. Yes.
>
> Q. Now, when he went to pass this car, whichever car it was that he was passing, they wouldn't let him back into line, is that correct?
>
> A. I don't remember at the time.
>
> Q. I will ask you, look at page 10, — if you were not asked this question, 'And he came out and started to pass the car but there was a truck coming, is that correct?' Answer, 'He was too far, you know, as he started passing the car he couldn't have swerved back in in time be-

cause they were all going and they wouldn't let him in, see.' Were you asked that question and did you give that answer?

A. Yes.

Q. Under the situation as it was then you felt it was only natural that he got excited, is that correct?

A. Yes, — well, I got excited myself.

Q. Isn't it a fact that you testified that he got excited and that it was natural, anyone would under the circumstances there?

A. Yes."

This testimony of the plaintiff is binding upon her, the Court and the jury, and precludes a recovery for gross negligence.

The Oregon Supreme Court, in discussing the binding effect of the admissions of the plaintiff to a cause of action, in the case of *Columbia Digger Sand & Gravel Co.* v. *Ross Island Sand & Gravel Co.*, 145 Or. 96, 25 P. (2d) 911, said on page 113:

> "The admissions made by a party to a legal controversy stand upon a different footing from those made by an ordinary witness. The officers of the defendant corporation represent the corporation. The admissions by a party made intelligently are judicial admissions which are binding upon the court and the parties, and the jury and the court should take

them as true. 22 C.J. 329, §370; *Connor* v. *Lake Shore & M.C. Ry. Co.*, 168 Mich. 29 (133 N.W. 1003); *Cogan* v. *Cass Ave. & F. G. Ry. Co.*, 101 Mo. App. 179 (73 S.W. 738)."

Under the Oregon Guest Passenger Statute, it is necessary that a guest-passenger prove that the accident was intentional on the part of the owner or operator or caused by his gross negligence or intoxication or his reckless disregard of the rights of others, (O.R.S. 30.110) and in this case the plaintiff has sought to rely upon the alleged gross negligence of the defendant, Hughes.

The most recent Oregon case which involved the question of whether a host's conduct in operating a motor vehicle amounted to gross negligence was *Whang* v. *Hong*, 61 Or. Adv. 589, 290 P. (2d) 185. In that case there was testimony that the defendant approached a dangerous intersection at 30 to 35 miles per hour, that he saw the other car involved when he was 20 or 25 feet from the intersection and the other car 75 feet away, and that he thought the other car would stop and "continued right on".

The jury returned a verdict in favor of the parent of the deceased guest, a nine year old son, and the Oregon Supreme Court reversed, holding that the trial judge should have directed a verdict in favor of the defendant; following the Oregon rule that mere inadvertence, thoughtlessness, brief inattention,

error in judgment and momentary loss of presence of mind do not constitute gross negligence (61 Or. Adv. at p. 592).

In this case Hughes was proceeding along with the rest of the traffic, came out to pass a car, saw a big truck coming but was prevented from returning to his own lane of traffic by another car (Tr. II, 30). He got panicky and threw on the brakes and tried to get back in his own lane (Tr. II, 14) and the car skidded down the highway sideways, the door opened and plaintiff and her brother went out (Tr. II, 15).

There was other testimony concerning the manner in which Hughes drove but these were plaintiff's own admissions and are binding upon her as pointed out above.

In the Oregon case of *Baird* v. *Boyer, et al*, 187 Or. 131, 210 P. (2d) 118, there was evidence that the defendant host was driving down a ten per cent grade bridge ramp in the city of Portland at a speed of 40 to 60 miles per hour and that the indicated speed was 20 miles per hour. He started speeding up and when the plaintiff guest warned him that he was about to hit a truck, said "I know it", slammed on his brakes and hit the truck.

It was held that this did not amount to gross negligence and that the defendant host's motion for judgment notwithstanding the verdict was

properly allowed. Significantly, in the Baird case, the plaintiff himself testified that the host's car was "moving along with the rest of the traffic" (p. 134).

So in this case there was no basis for submitting the issue of gross negligence to the jury, and appellant's case in being submitted to the jury, was given more consideration than that to which it was actually entitled. The questions raised by appellant on this appeal, therefore, are moot, but will be briefly answered in any event.

SPECIFICATION OF ERROR NO. 1

That the Court erred in instructing the jury on the defenses of contributory negligence and assumption of risk. The instruction which is objected to is set out in the appellant's Brief at p. 4.

Appellees contend that the instructions to the jury must be taken as a whole, and that this instruction, taken with the instruction on page 80, Transcript II, does in fact give a correct statement of the law of Oregon as to the duty of a guest-passenger. On page 80 of the transcript the Court says:

> "* * * Ordinary negligence is the failure to do that which an ordinary prudent person would have done or the doing of something which an ordinary prudent person would not have done under the same or similar circumstances. In other words, ordinary negligence is the mere failure to exercise reasonable care."

This statement, when taken together with the statements regarding the duty of a non-paying guest to avoid negligence, do in effect give the proper requirements and duties of the guest-passenger in order to protect themselves from being contributorily negligent.

In the case of *Elling* v. *Blake-McFall Co.*, 85 Or. 91, 166 Pac. 57, an instruction given the lower court was affirmed by the Supreme Court of the State of Oregon. The instruction at page 97, was as follows:

> " 'The plaintiff in this case was required to exercise reasonable care; that is, that degree of care which a person of reasonable prudence would exercise in the situation in which he was placed. If he had reason to suspect carelessness or incompetency on the part of the driver, it was his duty to protest and remonstrate with or caution him against being careless, or to caution him concerning the operation of the car, and if the driver was running the car at a dangerous rate of speed, and the plaintiff knew of the rate of speed and its danger, or, in the exercise of reasonable prudence, ought to have known and appreciated it, it was his duty to remonstrate against such speed, and direct the driver to slacken the same, and if he knew and appreciated the danger of a collision in time to avert it by promptly warning the driver, it was his duty to do so.'

> "We find no request for any more specific or different instruction upon this point. The law was given to the jury substantially as announced in *Rogers* v. *Portland Ry. L. & P. Co.*, 66 Or. 244, 251 (134 Pac. 9); and in *Tonseth* v. *Portland Ry. L. & P. Co.*, 70 Or. 341 (141 Pac. 868)."

In light of the *Elling* v. *Blake-McFall* case, supra, and *Hunt* v. *Portland Baseball Club,* 62 Or. Adv. 805, 296 P. (2d) 495, the instruction given was a proper statement of the law of the State of Oregon.

In the Hunt case the Oregon Supreme Court specifically recognizes that this is the law in Oregon:

> " * * * O.R.S. 30.110 and 30.120, which prevent a non-paying guest from recovering damages from his host in automobile and airplane accidents, unless the guest can prove evil intention, gross negligence or intoxication, denote a social policy that one who voluntarily exposes himself to a known danger should be held to have assumed the risks thereof."

In *Adair, Adm.* v. *Valley Flying Service*, 196 Or. 479, 250 P. (2d) 104, it was held that a complaint alleging that defendant had rented an airplane to a companion of plaintiff's decedent when he was obviously intoxicated, did not state a cause of action and barred a recovery as a matter of law, since it showed on its face that plaintiff's decedent was guilty of contributory negligence as a matter of

law in getting into the airplane with one in the alleged condition.

PART 2 OF APPELLANT'S SPECIFICATION OF ERROR NO. 1

As a further ground, appellant contends that the Court should not have instructed the jury as to the issues of contributory negligence and assumption of risk when they were not affirmatively pleaded by the defendants.

Rule 15(b) of the Federal Rules of Civil Procedure, provides in part as follows:

> "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings * * *"

Under this rule, the Court committed no error in instructing the jury as to contributory negligence or assumption of risk since the parties during the course of the trial did, in fact, treat these two issues as being a part of the case. (Tr. II, 62, 63, 90).

> "MR. COSGRAVE. The defendants have no exceptions. I will say with respect to the assumption of risk, — under the Federal Rules, it is my understanding that any issue which is treated by the parties as being before the Court can properly be presented to the jury. It is my understanding that even prior to the completion of all the testimony in this case the matter of

the assumption of risk was argued by counsel to the Court in chambers and the case has been treated at all times as though that was an issue.

THE COURT. Yes, I think that is correct and the evidence was introduced here on that."

SPECIFICATION OF ERROR NO. 2

Withdrawal of the charge of negligence in connection with the catch on the car door.

There was no evidence that this car door had ever opened while the car was being operated; the only trouble was in getting it closed (Tr. II, 47, 50). Nor was there any evidence that any condition of the door caused it to open during the accident. Further, the undisputed evidence was that appellees had repaired the door by installing a new door latch, (Def. Ex. 6, Tr. II, 64, 65, 67).

Since there was no evidence of any negligence in this respect, the Court very properly removed this issue from the jury's consideration.

SPECIFICATION OF ERROR NO. 3

The refusal to give the plaintiff's requested instructions concerning the car door.

The instructions requested were purely and simply an argument with respect to the circumstance of the car door which appellant requested the Court to make. Although a District Judge may com-

ment on the evidence, we know of no rule which makes it error for a judge to refuse to emphasize a particular phase of the case by an argumentative instruction.

Respectfully submitted,

WALTER J. COSGRAVE,
723 Pittock Block,
Portland 5, Oregon,
Attorney for Appellees.

Of Counsel:

Maguire, Shields, Morrison & Bailey,
723 Pittock Block,
Portland 5, Oregon.